

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BONNIE DANKENBRING
Claimant

VS.

K MART CORPORATION
Respondent
Self-Insured

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Docket No. 152,244

ORDER

Claimant appeals from the September 28, 1994 Award entered by Special Administrative Law Judge William F. Morrissey.

APPEARANCES

Claimant appeared by her attorney Eric Kjorlie of Topeka, Kansas. Respondent, a qualified self-insured, appeared by and through its attorney John David Jurcyk of Lenexa, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has reviewed and considered the record listed in the Award. The Appeals Board has also adopted the stipulations listed in the Award.

ISSUES

Claimant asks for review of the findings relating to:

- (1) Claimant's average weekly wage;
- (2) The nature and extent of claimant's disability; and
- (3) Whether claimant is entitled to vocational rehabilitation benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds:

(1) The findings by the Special Administrative Law Judge relating to average weekly wage should be affirmed. Claimant's average weekly wage at the time of her injury was \$467.20. This figure does not include the value of fringe benefits because fringe benefits were discontinued thereafter on different dates. Claimant's average weekly wage would be \$467.20 through January 8, 1991; \$505.48 through June 1, 1991; and \$535.20 thereafter.

Claimant has challenged the findings relating to average weekly wage on two grounds. First, claimant asserts that the Special Administrative Law Judge has included only three percent (3%) of claimant's earnings for profit sharing but should have used six percent (6%). In fact, the claimant testified, and there appears to be no other evidence on the issue, that she contributed six percent (6%) and the employer matched by 50 cents per each dollar she contributed. K Mart's weekly contribution would therefore be \$14.02, i.e. \$467.02 times .03. The figure used for profit sharing by the Special Administrative Law Judge is, therefore, correct.

Claimant also challenges the findings related to average weekly wage because they do not include the value of claimant's earned sick leave and vacation. However, as the respondent points out, when sick leave and vacation are used it is essentially the same as income. There is no testimony or evidence in the record indicating claimant was paid for unused time during the twenty-six (26) weeks prior to the date of accident.

The base calculation in K.S.A. 1988 Supp. 44-511 assumes forty (40) hours paid per week. This assumption avoids consideration of such factors as vacation and sick leave. Accordingly, the value of vacation time and sick leave are not to be added to claimant's average weekly wage.

The various fringe benefits which have been added to the average weekly wage in this case include \$29.54 per week in medical insurance, \$1.23 in life insurance, \$21.61 paid into the pension plan, \$1.60 for disability insurance and \$14.02 paid by the employer into the profit sharing plan. The total of base wage and fringe is, therefore, \$535.20 once all benefits were terminated.

(2) The Appeals Board finds claimant has a five percent (5%) permanent partial general body impairment of function from her work-related injury.

Claimant injured the mid-section of her back on March 3, 1989 when she picked up a box weighing sixty-five (65) pounds. Three (3) physicians testified regarding the nature and extent of the injury. Dr. Roger Hood diagnosed claimant's condition as a thoracic muscle strain. He concluded she would be able to continue to do her work at K Mart. He testified that when he saw claimant he did not elicit any complaints relating to the lumbar spine. He felt that if she did return to her warehouse work she might occasionally aggravate the strain, but would cause no additional permanent disability. He thought she might from time to time need heat, ice or aspirin if she returned to the warehouse work. He rated her impairment at five percent (5%) permanent partial impairment to the body as a whole.

Dr. P. Brent Koprivica also diagnosed a thoracic muscle strain. He found complaints in the lumbar region but indicated they were not caused by the lifting incident. He testified there would be no restrictions from the injury caused by the lifting incident and he rated the thoracic injury at two percent (2%) to the body as a whole.

Dr. John Wertzberger testified on behalf of the claimant. Although his testimony appears to assume that claimant's low back complaints were the result of a work-related injury, he never directly so testified. He described the x-ray and MRI changes as age related. The MRI and x-ray changes were in the lumbar region. Dr. Wertzberger's testimony does not override the more specific testimony by Dr. Roger Hood and Dr. Koprivica specifically limiting claimant's work-related injury to the thoracic region.

As indicated by the Special Administrative Law Judge, the record does not reflect any work restrictions imposed for injury to the thoracic region of the claimant's spine. Claimant does have degenerative changes in the lumbar spine which the Appeals Board finds were neither caused nor permanently aggravated by this work injury. The Appeals Board therefore finds that the award should be limited to the functional impairment and finds the five percent (5%), as determined by the Special Administrative Law Judge, appropriately reflects the nature and extent of claimant's impairment and disability.

(3) The Appeals Board agrees with and affirms the decision by the Special Administrative Law Judge to deny vocational rehabilitation benefits. As noted, the injury claimant suffered at work was not the cause for her inability to be employed at the same wage she was earning at the time of the injury. Claimant was subsequently terminated for poor performance. Claimant is therefore not entitled to vocational rehabilitation benefits.

AWARD

WHEREFORE THE AWARD BY THE SPECIAL ADMINISTRATIVE LAW JUDGE IS HEREBY MODIFIED AND AN AWARD OF COMPENSATION IS MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Bonnie M. Dankenbring, and against the respondent, K Mart Corporation, a self-insurer, for an accidental injury which occurred on March 3, 1989 and based on an average weekly wage of \$467.20 through January 8, 1991, \$505.48 through June 1, 1991 and \$535.20 thereafter for .57 weeks of temporary total disability compensation at the rate of \$263.00 per week in the sum of \$149.91, and compensation for 5% permanent partial general body disability for 96.14 weeks through January 8, 1991, based on the average weekly wage of \$467.20 at the rate of \$15.57 per week in the sum of \$1,496.90, for 20.57 weeks through June 1, 1991, based on the average weekly wage of \$505.48 at the rate of \$16.85 per week in the sum of \$346.60, and the remaining 297.72 weeks based on the average weekly wage of \$535.20, at the rate of \$17.84 per week in the sum of \$5,311.32, making a total award of \$7,304.73.

As of December 13, 1995, there is due and owing claimant \$149.91 in temporary total compensation, and compensation for 5% permanent partial general body disability for 96.14 weeks at the rate of \$15.57 per week in the sum of \$1,496.90, for 20.57 weeks at the rate of \$16.85 per week in the sum of \$346.60, and 236.43 weeks at the rate of \$17.84 in the sum of \$4,217.91, making a total due and owing of \$6,211.32 less compensation heretofore paid.

The remaining 61.29 weeks are to be paid at the rate of \$17.84 per week until fully paid or further order of the Director.

Future medical benefits will be awarded only upon proper application to and approval of the director. Unauthorized medical expense of up to \$350.00 is ordered paid to or on behalf of the claimant upon presentation of proof of such expense.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed to the respondent to be paid direct as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Curtis, Schloetzer, Hedberg, Foster & Associates Transcript of Preliminary Hearing (9-3-91)	\$250.98
Transcript of Preliminary Hearing (3-2-93)	\$ 73.24
Transcript of Regular Hearing	\$ 65.32
Braksick Reporting Service Transcript of Preliminary Hearing (5-5-92)	\$110.70
Appino & Achten Reporting Service Deposition of Bonnie M. Dankenbring	\$212.40
Deposition of Dona L. Wall	\$216.75
Metropolitan Court Reporters Deposition of Roger W. Hood, M.D.	\$180.00
Deposition of P. Brent Koprivica, M.D.	\$114.70
Deposition of John J. Wertzberger, M.D.	\$227.30

IT IS SO ORDERED.

Dated this ____ day of December 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Eric Kjorlie, Topeka, KS
John David Jurcyk, Lenexa, KS
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director